

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARLOS RICO DULEY,

Defendant-Appellant.

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UNPUBLISHED

August 24, 2006

No. 261560

Wayne Circuit Court

LC No. 04-011761-01

Before: Kelly, P.J., and Markey and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from his jury-trial convictions of two counts of assault with intent to commit great bodily harm less than murder, MCL 750.84, and one count each of felon in possession of a firearm, MCL 750.224f, carrying a concealed weapon (CCW), MCL 750.227, and discharge of a firearm from a motor vehicle, MCL 750.234a. Defendant was sentenced as an habitual offender, third offense, MCL 769.11, to concurrent prison terms of 9-1/2 to 20 years for each assault conviction, 38 months to 10 years for the felon-in-possession conviction, 38 months to 10 years for the CCW conviction, and 38 months to 8 years for the discharge of a firearm conviction. We affirm.

On appeal, defendant argues that he is entitled to a new trial because he was denied the effective assistance of counsel when counsel approved the jury instructions, which did not include a standard instruction with regard to identification.<sup>1</sup> In a supplemental brief filed in propria persona pursuant to Administrative Order No. 2004-6, Standard 4, defendant raises the additional issue that counsel was ineffective in failing to call defendant's girlfriend, Katinia Cook, as an alibi witness.

A defendant claiming ineffective assistance of trial counsel is required to file a motion in the trial court for a new trial or for a *Ginther*<sup>2</sup> hearing in order to preserve the issue for review.

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<sup>1</sup> Defendant concedes that any claim of error concerning the trial court's failure to give an identification instruction is deemed waived because of trial counsel's acquiescence in the instructions. See *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002).

<sup>2</sup> *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

*People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Because defendant failed to move for a new trial or an evidentiary hearing below, his ineffective assistance of counsel claim is limited to the existing record.<sup>3</sup> *People v Thomas*, 260 Mich App 450, 456; 678 NW2d 631 (2004).

The determination regarding whether counsel was ineffective is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To prevail on a claim of ineffective assistance of counsel, a defendant must show (1) that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed by the Sixth Amendment and (2) that, but for counsel’s errors, there is a reasonable probability that the result of the proceedings would have been different. *Id.* at 578; *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). The reviewing court “‘must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.’” *LeBlanc*, *supra* at 578, quoting *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Defendant cites *People v Anderson*, 389 Mich 155; 205 NW2d 461 (1973), overruled in part on other grounds, *People v Hickman*, 470 Mich 602, 603-604; 684 NW2d 267 (2004), in support of his contention that an instruction was required regarding the inherent unreliability of eyewitness identification testimony. However, *Anderson* does not establish such a requirement. Furthermore, defendant cannot overcome the strong presumption that counsel’s failure to request an identification instruction constituted sound trial strategy. It is reasonably possible that counsel purposely failed to request CJI2d 7.8, which, among other things, directs the jury to consider the distance between the witness and the defendant and the amount of time that passed between the crime and the identification and provides further that the jury may use the identification testimony alone to convict the defendant. Counsel may well have determined that such an instruction could prove harmful to the defense, given the close proximity between the witnesses and defendant at the time of the crime and the fact that one of the victims identified defendant’s photograph shortly after the incident.

Moreover, defendant has failed to demonstrate prejudice resulting from counsel’s failure to request an identification instruction. Counsel argued at length during his closing argument that the prosecution’s case was plagued by inconsistent and incomplete witness testimony and that there was simply not enough time before the shooting for the victims to have accurately identified defendant as the perpetrator. The jury was properly instructed on evaluating witness credibility and on the prosecution’s burden of proof. The instructions that were provided “fairly presented the issues to be tried and sufficiently protected the defendant’s rights,” *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001), and counsel’s fact-specific closing argument concerning the unreliability of the witnesses’ identification was likely more valuable to the defense than the general terms of CJI2d 7.8. Under these circumstances, defendant cannot establish that an identification instruction would have affected the outcome of his trial.

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<sup>3</sup> Defendant did file in this Court a motion to remand for an evidentiary hearing, but this Court denied the motion.

Nor do we find merit in defendant's supplemental claim that trial counsel was ineffective in failing to call Cook as an alibi witness. Indeed, we find that defendant cannot overcome the presumption that counsel employed sound trial strategy in failing to call this witness. See, generally, *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997). The proposed testimony set forth in Cook's affidavit simply mirrors the testimony given at trial by Cook's daughter. It cannot be said that this cumulative testimony likely would have produced a different outcome at trial. See *Carbon, supra* at 599-600, *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004), and *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

Affirmed.

/s/ Kirsten Frank Kelly

/s/ Jane E. Markey

/s/ Patrick M. Meter